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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FINOVA Capital Corporation, a Delaware corporation Plaintiff/Counter-defendant vs. Richard A. Arledge, Inc. a Texas corporation d/b/a Arledge Motor Co., Richard A. Arledge, individually and as the husband of Peggy L. Arledge, and Peggy L. Arledge, individually and as the wife of Richard A. Arledge, Defendants/Counter-Plaintiff/Third-Party Plaintiff, vs. Leucadia National Corporation, Third-Party Defendant.	No. CIV 02-1277-PHX-RCB O R D E R

Background

Essentially the present action is a contract dispute arising

out of a Loan Agreement between plaintiff FINOVA Capital Corporation ("FINOVA"), as the lender, and defendants Richard A. Arledge, Inc. d/b/a Arledge Motor Co. ("AMC"), *et al.*, as the borrowers. Following a six day bench trial, the court issued its findings of fact and conclusions of law as Fed. R. Civ. P. 52(a) requires. In FINOVA Capital Corporation v. Arledge, 2006 WL 2547350 (D. Ariz. Aug. 31, 2006) (doc. 266) ("FINOVA II"), the court found that defendants were liable to FINOVA because although FINOVA breached the Loan Agreement, the "nature of th[at] breach . . . was not so fundamental" so as "to excuse defendants" from certain obligations thereunder. Id. at *9, ¶ 6. Thus, the court awarded FINOVA damages in "the principal amount of $1,665,193.30," plus pre-judgment interest and post-judgment interest thereon. Id. at *9, ¶ 13(a). By the same token though, the court also found that FINOVA breached the Loan Agreement. Id. at *9, ¶ 14. Hence, the court awarded AMC damages in "the principal amount of $479,213.08," plus pre-judgment and post-judgment interest thereon. Doc. 269 at 2, ¶ 2.[1]

Currently pending before the court are two post-judgment motions: (1) "Plaintiff's Motion to Alter or Amend Judgment and to Amend Findings and Conclusions" (doc. 278); and (2) "Defendants' Motions for New Trial, to Amend Findings of Fact and Conclusions of Law and to Amend Judgment and Supporting Memorandum of Points and Authorities"[2] (doc. 280). In addition, also pending before the

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[1] As a result of AMC's recovery against FINOVA, the judgment provides for a set-off. See Doc. 269 at 2, ¶ 3.

[2] Although, as just stated, defendants style this motion as one for a new trial (among other things), a close reading of their motion shows that they are not actually seeking a new trial. Rather, defendants are seeking to have this

court is "Plaintiff's Motion for Order (A) Exonerating Parties Under Bonds and (B) Vacating Provisional Attachment Order" (doc. 268). Having found oral argument unnecessary, the court rules as follows.

Discussion

I. Post-Judgment Motions

A. Governing Legal Standards

1. Fed. R. Civ. P. 52

The parties timely moved for relief under Fed. R. Civ. P. 52. Rule 52(b) provides in relevant part that "[o]n a party's motion filed not later than 10 days after entry or judgment, the court may amend its findings – or make additional findings – and may amend the judgment accordingly." "Recognized grounds for Rule 52 motions include: (1) the trial court made a manifest mistake of fact or law, (2) there is newly discovered evidence, and (3) there has been a change in the law." Cohn v. Contra Costa Health Services Department, 2006 WL 825276, at *1 (N.D. Cal. March 29, 2006) (internal quotation marks and citation omitted). However, "[a] party may not use Rule 52 to relitigate issues or advance new legal theories, and a court should not rehear the merits of the case." Id. (internal quotation marks and citation omitted). Likewise, "Rule 52 is not a substitute for appeal, nor is it an equitable response to the request for just one more time, please." Id. at *2

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court "vacate" FINOVA II and the judgment entered in accordance therewith. Mot. (doc. 280) at 4. Defendants are further seeking to have this court "reopen the case and enter [their pre-trial] proposed findings of fact and conclusions of law [,]" and then enter "a judgment consistent therewith." Id. Alternatively, defendants are seeking to have this court "at a minimum, . . . amend the findings of fact and conclusions of law" in FINOVA II, and likewise to amend the judgment as to four separate issues which will be discussed herein. See id. The court will tailor its discussion of defendants' motion accordingly, omitting any consideration of a new trial.

(internal quotation marks end citation omitted).

2. Fed. R. Civ. P. 59

The standard for altering or amending a judgment under Rule 59(e) is nearly identical to the standard for granting similar relief under Rule 52. According to the Ninth Circuit, "[a]mendment or alternation is appropriate under Rule 59(e) if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law." Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001) (citation omitted). Rule 59(e) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). Thus, "absent highly unusual circumstances[]" a judgment is not properly reopened. Id.; see also Cohn, 2006 WL 825276, at *1 (internal quotation marks and citation omitted) ("[A] judgment [in a nonjury case] should not be set aside except for substantial reasons.")

Denial of a motion to amend a judgment is subject to an abuse of discretion standard of appellate review. See Gibson v. Galaza, 2007 WL 868011, at *1 (E.D. Cal. March 20, 2007) (citing Far Out Productions, Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001)). Generally, "[a] district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts." Id. (citing Coughlin v. Tailhook Ass'n, 112 F.33 1052, 1055 (9th Cir. 1997)). With these general principles firmly in mind, the court has carefully considered the

parties' respective motions to alter and/or amend the judgment.

B. FINOVA's Post-Judgment Motion

1. Opportunity to Cure

Earlier in this litigation, among other things, the court rejected "Finova's contention that a violation of the [Loan Agreement's] MNCF [minimum net cash flow] covenant is incurable." Doc. 167 ("FINOVA I") at 25. The court thus partially granted defendants' summary judgment motion finding that "while there [wa]s a qualifier as to the cure allowed ("Lender's satisfaction")," under the terms of the subject Loan Agreement, "there [wa]s unquestionably a right to cure[]" the MNCF covenant. Id. at 24. Further, in FINOVA I the court found that "a meaningful 'cure' must necessarily permit the [defendants] to inject enough money into the company to achieve a positive net cash flow, as defined in . . . the Loan Agreement[.]" Id. at 27. The court opined that "[n]o other interpretation of th[e] [MCNF] covenant would be reasonable under the contract as a whole."[3] Id.

Given these rulings, plainly one of the issues at trial was whether FINOVA gave defendants an opportunity to exercise their right under the Loan Agreement to cure the minimum net cash flow covenant ("MNCFC"). After carefully considering all of the trial proof, in FINOVA II this court expressly found that FINOVA "did not allow AMC the opportunity to cure[;]" hence FINOVA breached the Loan Agreement. See FINOVA II, 2006 WL 2547340, at *9. As FINOVA views the trial proof, however, there was no evidence to support

[3] FINOVA "accept[s]" these rulings "[f]or purposes of this motion," but is expressly reserving its rights to challenge these rulings on appeal. See Mot. (doc. 278) at 4, n.2.

that conclusion. Thus, "as a matter of law[]" FINOVA asserts that that finding cannot be a basis for holding that it breached the Loan Agreement. See Mot. (doc. 278) at 6.

FINOVA correctly frames the issue on this motion as "whether there is any evidence to support the Court's conclusion that FINOVA 'did not allow AMC the opportunity to cure' its cash flow shortfall." Id. at 5. FINOVA goes on, however, to couch its argument in slightly different terms. More specifically, FINOVA contends that "there [wa]s no evidence that [it] *prevented* defendant Richard Arledge from infusing cash into his own company in an attempt to cure any cash shortfall." Id. (emphasis in original).

To support this contention, FINOVA relies upon a snippet of trial testimony from Ryan De Witte, the FINOVA Account Executive responsible for AMC's account. Mr. De Witte agreed that after he noticed that AMC was in default under the Loan Agreement on May 7, 2002, he "sent an e-mail with a spreadsheet containing FINOVA's calculation of the [MNCFC] on May 16th, May 17th[.]" Id. (citation omitted). Following up on that question, Mr. DeWitte was asked "with that information, did Mr. Arledge ever put money into [AMC] to make up for that difference?" Id. (citation omitted). Mr. De Witte simply responded, "No." Id. (citation omitted). From FINOVA's perspective, this testimony shows that the prevention "issue never even arose[]" during the trial. Id.

Defendants retort that by framing it in terms of prevention, FINOVA is "mischaracteri[zing]" the issue. Resp. (doc. 285) at 2. Furthermore, FINOVA's prevention argument, according to defendants, "ignores the fact that [defendant] Arledge repeatedly disputed the

MNCFC calculation on which the alleged default was based[.]" Id. (citations and footnote omitted). As defendants summarize it, the court should deny FINOVA's motion on the cure issue because "with a dispute as to the accuracy of the MNCFC calculation, and, more importantly, without any information as to the amount FINOVA would require and in the face of a claim that the default could not be cured, Arledge can hardly be faulted for not infusing an uncertain and unknown amount of cash to cure an 'incurable' default." Id. at 3 (citations omitted).

At the outset, the court observes that preventing the Loan Agreement from being cured or "not allow[ing] AMC the opportunity to cure[,]" are two sides of the same coin. See FINOVA II, 2006 WL 2547340, at *9. It is possible, for example, to view FINOVA's failure to provide defendants with an amount of the claimed MNCFC violation as an act by FINOVA which effectively prevented defendants from curing that violation. At the same time, it is also possible to view that same inaction by FINOVA, as did the court, as "not allow[ing] AMC the opportunity to cure[.]" See id. Thus, as can be seen, reframing the cure issue does nothing to advance FINOVA's argument that the evidence does not support the court's finding that FINOVA did not allow AMC the opportunity to cure.

What is more, there is ample record proof, which FINOVA conveniently overlooks, to support this court's determination that FINOVA "did not allow AMC the opportunity to cure" the MNCFC violation. See id. For instance, by selectively quoting from Mr. De Witte's trial testimony, FINOVA fails to take into account that he repeatedly testified that the MNCFC violation could not be

cured. Mr. De Witte took that position during a conversation he had with defendant Arledge shortly after Arledge received the May 7th Default Notice from FINOVA. See Tr. (4/11/06) (doc. 273) at 151-52. Mr. De Witte's testimony in that regard was unequivocal. When asked, "Do you remember making it clear to Mr. Arledge that a violation of the [MNCFC] in his loan agreement could not be cured[,]" Mr. De Witte responded, "I do recall that, absolutely." Id. at 153. Mr. De Witte freely admitted that following the May 7th Default Notice he had "numerous conversations" with defendant Arledge during which he told Arledge "that it [the MNCFC] was a non-curable default." Id. at 184. Plainly the foregoing supports this court's factual finding in FINOVA II that during the ten day cure period "De Witte *continued* to tell Arledge that the violation was not curable." FINOVA II, 2006 WL 2547340, at *5 (emphasis added).

In a similar vein, Mr. De Witte agreed that "there was nothing that [Mr.] Arledge could have done to cure a breach of that covenant [MNCF][.]" Doc. 273 at 153:12-14. Mr. De Witte explained that that was his "viewpoint[,] . . . based on conversations with [FINOVA's] in-house counsel." Id. at 153:17-18. FINOVA, through Mr. De Witte, held steadfastly to its conviction that the default was incurable "[e]ven in the first part of June," 2002. Id. at 166:8. This view was echoed in a June 11, 2002, letter from FINOVA's Vice President and Assistant General Counsel wherein he states:

> FINOVA maintains that events of default exist under the loan agreement. Moreover, as you are probably aware, breaching a financial covenant is not susceptible to being cured because it is based on financial

> performance measurement for a specific period of time. In other words, borrower cannot undo its financial performance that results in a covenant violation.

Id. at 190 (quoting exh. 127 at 2).

Consistent with its position that the MNCFC was not curable, when asked if "Finova ever provide[d] [him] *any means* by which [he] could cure the [MNCFC][,]" defendant Arledge simply responded, "No." Tr. (4/14/06) (doc. 274) at 165. Indeed Arledge testified that he "was told specifically that putting money in would not cure the [MNCFC]." Id. at 164. Not only is the record replete with references to the fact that FINOVA viewed the default as incurable, it also contains testimony from Mr. DeWitte conceding that prior to this litigation FINOVA never sent defendants "[c]orrect calculations" as to the amount necessary to cure the default. See Doc. 273 at 188-89. This failure to provide defendants with the accurate calculations necessary to cure the default was compounded by FINOVA's insistence that the default was not curable in the first instance.

As the foregoing shows, there are ample record facts to support the court's conclusion of law that "**FINOVA** breached the Loan Agreement when . . . it did not allow AMC the opportunity to cure[.]" FINOVA II, 2006 WL 2547340, at *9, ¶ 14. Moreover, even if framed, as FINOVA does, in terms of FINOVA preventing defendants from curing the breach, the same evidence can easily support that conclusion as well. In short, although the court may have "[d]rawn[n] different inferences from the evidence and testimony at trial than [FINOVA] would have preferred" as to whether FINOVA allowed defendants the opportunity to cure, that "does not rise to

the level of a manifest error of fact." See Cohn, 2006 WL 825276, at *2. Nor has FINOVA shown that the court "made a manifest mistake of . . . law" in finding that FINOVA did not give defendants an opportunity to cure the breach. See id. at *1 (internal quotation marks and citation omitted). In fact, FINOVA has not pointed to any law to support such a view.

As can be seen, in essence FINOVA is attempting to relitigate the cure issue. As set forth at the outset, however, neither Rule 52 or Rule 59 provides a basis for the court to reconsider the merits. Accordingly, the court denies FINOVA's motion to alter and/or amend to the extent that motion is premised upon the court's finding that FINOVA did not allow defendants the opportunity to cure the default.

2. Sale of Leases

In FINOVA II the court made several factual findings with respect to a May 20, 2002, letter from defendant Arledge to Mr. De Witte. In that letter, defendant Arledge wrote, among other things:

> I AM REQUESTING **FINOVA** TO *ALLOW ME TO SELL SOME OR ALL OF MY LEASES*. THE MONIES GENERATED BY THIS SALE WILL ENABLE ME TO PAY DOWN THE DEBT TO **FINOVA** AND GENERATE CASH, WHICH WILL ALLOW ME TO PURCHASE A NEW CAR FRANCHISE.

FINOVA II, 2006 WL 2547340, at *6 (quoting exh. 125) (emphasis added). The court flatly rejected Arledge's contention "that this letter was a written request for the exact amount that was needed to cure the Default." Id. Although it disagreed with Arledge as to the meaning of this letter, the court did find found that "**FINOVA** never responded to Arledge's request." Id. Based upon the foregoing, the court held that "**FINOVA** breached the Loan Agreement

. . . when it failed to give AMC an answer regarding its request to sell leases." Id. at *9.

Now FINOVA is seeking to have the court amend FINOVA II to delete this particular conclusion of law. As with the cure issue, FINOVA claims that there is no evidence in the record to support the conclusion that it did not respond to defendant Arledge's request to sell leases. In its Reply, FINOVA further claims that the court "overlooked" the following testimony by Mr. De Witte. When asked whether he "recall[ed] what [he] told [Mr. Arledge] Finova's position was as to selling . . . leases[,]" DeWitte replied: "I told [Arledge] that to the extent that he was able to go out and find a buyer to buy his assets, that he certainly could do so as long as the proceeds were used to pay off Finova's debt." Doc. 273 at 67. From FINOVA's perspective, this testimony undermines the court's legal conclusion that FINOVA breached the Loan Agreement by "fail[ing] to give AMC an answer regarding its request to sell leases." FINOVA II, 2006 WL 2547340, at *9.

Despite FINOVA's protestations to the contrary, the court did not "overlook" the quoted excerpt from Mr. De Witte's trial testimony, which is FINOVA's sole basis for challenging the court's finding that it did not respond to defendant Arledge's request to sell leases. Instead, as was its prerogative, the court choose to credit the overwhelming countervailing testimony. For example, Mr. Arledge testified that repeatedly FINOVA did not respond to his requests, verbal or written, to sell leases. See Doc. 274 at 124:16-24; 154:3-6; and 154: 13-25. In fact, when pointedly asked, "did Mr. DeWitte or anybody at Finova ever discuss with you your requ[ests] to sell leases[,]" Mr. Arledge replied, "No." Id. at

154:25 - 155:1-2. Mr. Arledge answered in much the same way when asked whether "Finova ever respond[ed] to [his] request to sell leases[,]" emphatically stating, "Finova has *never responded* to my request to sell leases Id. at 156:11 (emphasis added).

In light of the foregoing, and taking the record as whole, there was no "manifest mistake of fact or law[]" warranting altering or amending the judgment with respect to the court's finding that FINOVA did not respond to Arledge's request to sell leases. As it did with the cure issue, FINOVA is seeking to have the court rehear the merits of this case, which is an improper basis for invoking Rule 52 or, for that matter, Rule 59. Thus, the court denies FINOVA's motion to alter or amend the judgment and to amend the court's findings of fact and conclusions of law as set forth in FINOVA II as it relates to the court's finding that FINOVA did not respond to defendant Arledge's request to sell leases.

3. Lost Sales Tax Credits

In FINOVA II, this court found that "AMC is entitled to the damages incurred due to lost tax credits[.]" FINOVA II, 2006 WL 2547340, at *10, ¶ 22. In awarding such damages, the court expressly "accept[ed] Don Erickson's, Defendants' expert, calculation on th[at] issue, equaling $301,260.00[,]" and cited to page 5 of exhibit 296, Mr. Erickson's entire report, as the basis for that finding. See id. (citation omitted).

In the event the court, as it has, upholds its findings of liability against FINOVA as to defendants' counterclaim, FINOVA is making an alternative "narrow request[.]" Mot. (doc. 278) at 9. It is seeking to amend the judgment to reduce the "principal amount of the damage award against" FINOVA from $479.213.08 to

$363,177.94. Id. at 10, ¶ E(ii). Consistent with that request, FINOVA also is seeking to amend paragraph 22 of section B of FINOVA II, entitled "Conclusions of Law with Respect to Defendants' Counterclaim[,]" to replace the number "301,260.00" with "$185,224.86[.]" Reply (doc. 286) at 9, ¶ 2(a). This reduction represents the difference between the lost tax credit damages ($301,260.00) as indicated in Mr. Erickson's expert report which was not admitted into evidence (exh. 296 at 5), and the amount of such credits to which he actually testified ($185,224.86). See Tr. (4/17/06) (doc. 275) at 112:18-22. FINOVA also seeks to amend the order, as reflected in FINOVA II, to delete the reference to exhibit 296 because, as just noted, that exhibit was not offered or received into evidence. See Reply (doc. 286) at 9, ¶ 2(b).

Plainly FINOVA's position is well taken; and, indeed, defendants explicitly "concede" that this reduction is proper "based on the evidence presented at trial." Resp. (doc. 285) at 2, n.1. Accordingly, the court grants FINOVA's motion to alter or amend the judgment, and likewise to amend the FINOVA II order to omit the reference to exhibit 296, as just discussed. In all other respects, however, for the reasons set forth above, the court denies FINOVA's motion to alter and/or amend FINOVA II and the corresponding judgment.

C. Defendants' Post-Judgment Motion

Defendants contend that this court in FINOVA II (and in the corresponding judgment) committed "manifest errors of both law and fact" with respect to four different issues, each of which will be discussed below. See Mot. (doc. 280) at 4. From defendants' standpoint because those four issues "go [to] the heart of this

case[,]" the court should "completely vacat[e] [FINOVA II] and the Judgment and entering the proposed Findings of Fact and Conclusions of Law lodged by Defendants prior to trial." Id. at 17. If the court disagrees, "at a minimum[]" the defendants "urge" the court to delete nine specific parts of FINOVA II, and to add three new findings of fact and six new conclusions of law. See id. at 17-18.

1. MNCFC Violation

According to defendants, under section 1.40 of the Loan Agreement, "[t]o calculate AMC's Net Cash Flow and prove a violation of the [MNCFC], FINOVA had to include in its calculations[,]" among other things, "'all [of AMC's] cash receipts, including, but not limited to, collections on Receivables and Lease[s], down payment, trade-ins on sales and repossession recoveries.'" Id. at 5 (quoting FINOVA II, 2006 WL 2547340, at *2 (quoting in turn exh. 108)). Defendants maintain, however, that FINOVA did not fully comply with that requirement because "in determining AMC violated the MNCFC and in issuing its May 7, 2002, default letter, FINOVA admitted 'all cash receipts' of AMC were not included in its calculations, nor did it offer at trial calculations purporting to include the omitted cash receipts." Id.

Defendants further argue, albeit implicitly, that FINOVA erred in calculating AMC's net cash flow because it did not include defendant Arledge's contributions to AMC. See id. at 6. Based upon the foregoing, defendants maintain that "FINOVA did not satisfy its burden" of proving that "AMC violated the MNCFC." Id. In other words, defendants argue that FINOVA did not prove an MNCFC violation at trial because FINOVA improperly calculated their net cash flow.

This defense argument is not new to the court. At various times throughout this litigation, including during the trial, defendants made this same argument.[4] Thus the court finds that, as did FINOVA, defendants are improperly Rules 52 and 59 to relitigate previously resolved issues, *e.g.*, the issue of how FINOVA calculated the MNCFC violation. In essence, defendants are asking this court to "rehear the merits of the case," which is precisely what a court should *not* do on a Rule 52 motion such as this. See Cohn, 2006 WL 825276, at *1.

What is more, even if the court were to revisit the issue of how FINOVA calculated the MNCFC violation, it would reach the same conclusion: FINOVA proved that defendants breached that covenant. Among other ways, FINOVA proved that breach through the testimony of Mr. De Witte. He explained that in accordance with the express terms of the Loan Agreement, to calculate defendants' net cash flow FINOVA examined the financial statements provided by defendants.[5] See Resp. (doc. 284) at 5 (citing doc. 273 at 60:25-61:1-9). When it did that, FINOVA found a violation of the MNCFC. See id. (citing, *inter alia*, doc. 273 at 51:9-25-52:1-15). Thus, to the

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[4] In fact, in the Final Pretrial Order, to which the parties stipulated, among the "contested issues of fact and law[]" defendants identified were the following:

> Whether FINOVA included AMC's security deposits, repossession fees, returned check charges and late fees in calculating the [MNCFC][;] [and] . . . Whether FINOVA included the cash the Arledges deposited into AMC in calculating the [MNCFC].

Doc. 231 at 17, ¶¶ 4 and 5.

[5] Section 1.40 of the Loan Agreement defined "Net Cash Flow" as "the sum" of "all cash receipts" and "all cash expenses" which were "reflected on the financial statements of Borrower [Arledge d/b/a AMC] to Lender [FINOVA][.]" Def. Tr. exh. 108 at 4, § 1.40.

extent defendants are suggesting in this motion that FINOVA did not prove a breach of the MNCFC because it did not look beyond the financial documents provided by defendants, plainly that argument is without merit. The Loan Agreement did not place such an obligation upon FINOVA. FINOVA was entitled, as it did, and as defendants were aware that it would, to rely upon the financial statements defendants supplied to calculate the net cash flow. See Doc. 274 at 13:7-16. Succinctly put, defendants have not satisfied the court that it made a "manifest mistake of law or fact" when it found that AMC violated the MNCFC. Thus, the court denies defendants' motion to alter and/or amend the judgment in this regard.

2. Estoppel

As to FINOVA's complaint, the court specifically found that "[b]etween May 7, 2002 and May 17, 2002, [defendant] Arledge called [FINOVA] numerous times to discuss the MNCFC violation." FINOVA II, 2006 WL 2547340 at *5. Even though "[d]uring those conversations, Arledge asserted that, according to his own calculation, AMC was not in default[,]" the court found that "AMC refused to provide such exonerating calculations to [FINOVA] for comparison." Id. Perhaps more significant in terms of the present motion is the court's additional finding that "[t]hroughout the litigation of this lawsuit, Arledge and AMC continued to refuse to provide such calculations based on attorney client privilege and the work product doctrine." Id.

Indeed, it was not until May 6, 2005, that defendants ultimately provided FINOVA with the purportedly exonerating calculations. See id. at *6. In light of these findings of fact,

the court expressly held that "[d]efendants [we]re estopped from asserting that, under a recalculation of AMC's cash flow, Arledge was not in violation of the MNCFC in February and March of 2002." See Id. at *9, ¶9. The court reached this conclusion because defendants "prevented **FINOVA** from receiving and reviewing the information regarding the recalculations." Id.

As an additional basis for vacating the judgment, defendants challenge this "estoppel" ruling. They do so on two grounds. First, defendants note that FINOVA did not specifically "identify estoppel in the [pre-trial order] as a means to avoid AMC's assertion [that] FINOVA did not properly calculate or prove the default under the MNCFC." Mot. (doc. 280) at 7 (footnote omitted). This argument is without merit. Even a cursory reading of FINOVA II shows that the issue was not whether FINOVA established estoppel as an affirmative defense. Rather, the issue was whether defendants should be precluded from relying upon Arledge's recalculations due to defendants' failure to timely disclose that evidence. Clearly those are separate and distinct issues. Thus, even assuming *arguendo* that FINOVA did not assert estoppel as an affirmative defense in the pre-trial order, such an omission is not fatal to the court's "estoppel" ruling because that ruling was not predicated upon FINOVA's proving estoppel as an affirmative defense.

Second, assuming (incorrectly) that the court in FINOVA II was applying the doctrine of equitable estoppel, defendants assert that the court erred because FINOVA did not prove "even one of the three elements necessary" to establish equitable estoppel. See id. at 8. Defendants further claim that because equitable estoppel is an

affirmative defense, by invoking it to "preclude [defendants'] direct rebuttal of evidence offered by FINOVA that a violation of the MNCFC occurred[,]" the court "effectively turn[ed] on its head FINOVA's burden to prove a breach of the MNCFC." Id.

FINOVA accurately responds that defendants' second argument "miss[es] the point of the Court's estoppel ruling[.]" Resp. (doc. 284) at 7. To be sure, the court did state that defendants were "estopped from asserting that . . . Arledge was not in violation of the MNCFC[.]" FINOVA II, 2006 WL 2547340, at *9, ¶ 9. Despite the court's use of the word "estop[,]" it is readily apparent from FINOVA II and the prior proceedings as detailed in the record, that the court did not actually rely upon estoppel as a legal term of art or doctrine as, for example, equitable or judicial estoppel. Rather, as even a cursory reading of FINOVA II shows, what the court actually did was to preclude defendants from relying upon Arledge's recalculation of AMC's cash flow. The primary reason for preclusion was defendants' failure to timely disclose, and the resultant prejudice to FINOVA. Accordingly, defendants' equitable estoppel analysis is not relevant to the court's decision to preclude defendants' recalculation evidence.

Moreover, given defendants' history of not providing the supposedly exonerating calculations, the court was within its discretion in precluding the admission of such evidence under Fed. R. Civ. P. 37(c)(1) – a fact which defendants overlook. Under that Rule, when a party, "without substantial justification fails to

disclose" certain information,[6] that party is "not, unless such failure is harmless, permitted to use as evidence at a trial. . . any . . . information not so disclosed." Fed. R. Civ. P. 37(c)(1). Defendants, as the party facing preclusion, had the burden of proving harmlessness. See Yeti by Molly v. Deckers Outdoor Corp., 259 F.3d 1101, 1107 (9th Cir. 2001) ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness.")

In FINOVA II the court did not explicitly find that defendants were "without substantial justification" when they did not timely disclose Arledge's recalculations. The circumstances surrounding defendants' failure to disclose that evidence, which are well documented in the record,[7] readily support such a finding however. In FINOVA I this court held that "while Finova may have originally erred to some degree in its original calculation of AMC's default of the MNCF covenant - AMC was in fact (to *some* degree) in violation of that covenant." FINOVA I (doc. 167) at 14 (emphasis in original). Not only that, in FINOVA I the court expressly noted that it had "little trouble concluding that some violation of the MNCF covenant occurred (*based on Defendants' failure to dispute this specific point*)[.]" Id. at 14-15 (emphasis added). The litigation proceeded with FINOVA relying upon those rulings.

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[6] The type of "information" to which Rule 37(c)(1) applies includes "a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the *disclosing party may use to support its claims or defenses[*.]" Fed. R. Civ. P. 26(a)(1)(B) (emphasis added). Plainly Arledge's recalculations supported defendants' position that the MNCFC was not breached, and thus such evidence falls into the category of documents which defendants had a duty to disclose under Rule 26.

[7] See, e.g., Resp. (doc. 284) at 7-10 (and citations therein).

Within days after the issuance of FINOVA I, however, defendant Arledge "realized" that FINOVA's calculations, which formed the basis for finding that "AMC had violated the MNCFC did not include" certain items. FINOVA II, 2006 WL 2547340, at *6 (citation omitted). Therefore, Arledge recalculated AMC's net cash flow and "[i]n April 2005, [he] conducted a final calculation of the MNCFC for the contested time period." Id. As noted earlier, that "calculation was ultimately provided to **FINOVA** on May 6, 2005[,]" after the close of discovery. Id. The timing of Arledge's recalculations (coming on the heels of an adverse summary judgment ruling), coupled with their late disclosure, provides sufficient justification for preclusion under Rule 37(c)(1).

What is more, finding that defendants were "without substantial justification" for failing to timely disclose is implicit in the court's stated "belie[f]" that there was "harm to plaintiff [FINOVA] in [defendants'] failure to disclose [that evidence] earlier." Doc. 275 at 92:10. The record easily supports this finding of harm given, as just explained, the timing of defendants' disclosure of the cash flow recalculations. Thus, because defendants were "without substantial justification" for their late disclosure of Arledge's recalculations, and because defendants did not satisfy their burden of showing that such disclosure was harmless, preclusion under Rule 37(c)(1) was warranted. Accordingly, to the extent defendants are seeking to amend the judgment based upon that preclusion ruling, the court denies this aspect of defendants' motion.

3. Material Breach

Third, defendants disagree with the court's conclusion of law

that "the nature of [FINOVA's] breach . . . was not so fundamental to the contract to excuse [them] from (1) granting FINOVA access for a requested audit; (2) paying interest payments; and (3) paying overadvance principal payments." Mot. (doc. 280) at *9, ¶ 6. They also challenge the court's related finding that "had **FINOVA** funded the requested advance of $34,000 (requested on or about June 20, 2002), it would not have altered in any material way Defendants' ability to pay the overadvances." FINOVA II, 2006 WL 2547340, at *9, ¶ 12.

Once again, defendants are taking the position that "FINOVA's breaches, including . . . its refusal to allow AMC to sell leases to pay off the loan and to make the advance requested on June 20, 2002 were material and excused AMC's further performance." Mot. (doc. 280) at 10. Defendants then analyze each of the five factors under section 241 of the Restatement of Contracts (Second), which they claim should be taken into account when deciding whether a given breach is material. Defendants assert that they are entitled to relief under Rule 52 and/or Rule 59 because the "the Court failed to properly apply" those Restatement factors. Id. at 11.

FINOVA responds analyzing the same five Restatement factors, and reaches the opposite conclusion: The court properly found that FINOVA's breach was not material so as to excuse defendants from performing certain obligations under the Loan Agreement.

This materiality argument need not detain the court for long. This is an argument which defendants have consistently made throughout this litigation. In fact, in the Final Pre-Trial Order (to which the parties stipulated), not only did defendants argue, as they are on this motion, a material breach by FINOVA, but they

also outlined the five Restatement factors. See Doc. 231 at 11-13. Defendants' argument is nothing more than a transparent attempt to relitigate the material breach issue. However, as noted earlier, the purpose of a Rule 52 motion is not to rehear the merits of the case. See Cohn, 2006 WL 825276, at *1.

Furthermore, defendants have not shown as they must on a motion to alter or amend a judgment that the "court made a manifest mistake of fact or law[]." See id. Likewise, defendants have not shown, as Rule 59 requires, that the court "committed clear error or made an initial decision [as to the materiality issue] that was manifestly unjust[.]" See Zimmerman, 255 F.3d at 740. At the end of the day, defendants' argument is nothing more than a disagreement as to how the court, albeit implicitly, applied the Restatement factors. This disagreement does not rise to the level of "highly unusual circumstances" so as to justify reopening this judgment, however. See Kona, 229 F.3d at 890.

4. Receivables

Due to "**FINOVA's** foreclosure of AMC's assets and collateral, AMC allege[d] that it was forced out of business[.]" FINOVA II, 2006 WL 2547340, at *8. As outlined in FINOVA II, defendants claimed to have sustained a variety of damages as a result of that foreclosure, including "lost . . . equity in [their] receivables, [and] lost future profits." Id. Although the court did award some types of damages to defendants, it expressly found that there was "an insufficient showing that AMC suffered any lost profits." Id. at *10, ¶ 24. Given that lack of proof, the court held that AMC was "not entitled to any damages for *other* alleged lost profits." Id. (emphasis added).

The fourth and final defense argument for altering or amending the judgment is that the court "should have considered and awarded AMC the equity it lost in its collateral upon which FINOVA foreclosed[]" – equity which defendants value at $1,300,968,11. See Mot. (doc. 280) at 15 and 18. FINOVA counters that "the Court properly determined that AMC failed to establish its lost profits, which necessarily included the profits reflected by the 'equity' in the accounts receivable as of May 2002." Resp. (doc. 284) at 16 (footnote omitted). That determination was proper, according to FINOVA, because as the court found, AMC did not establish lost profit damages "with the level of certainty required by law." Id. Defendants' response is two-fold. First, defendants maintain that the "lost receivables" are separate damages from those for lost profits. See Reply (doc. 288) at 7. Second, defendants believe that in any event they did prove the "lost equity in receivables damages with sufficient certainty." Id.

Underlying defendants' argument is the assumption that because in its conclusions of law the court in FINOVA II did not specifically mention AMC's receivables, it did not consider whether defendants were entitled to an award of such damages. This is an understandable, but inaccurate assumption. To the extent the court contemplated awarding damages other than those discussed in section II(B), ¶¶ 16-23, those damages are subsumed in the reference to "*other* alleged lost profits." See FINOVA II, 2006 WL 2547340, at *10, ¶ 24 (emphasis added). Hence, because the court held that there was an "insufficient showing that [defendants] suffered any lost profits[,]" that holding applies with equal force to defendants' claimed damages for lost equity in their receivables."

See id.

With that clarification, the court notes that as with the other issues which defendants raise on this motion, they are impermissibly seeking to relitigate an issue which they argued unsuccessfully during trial. Basically defendants are asking this court to reexamine the trial proof as to the equity value of AMC's receivables (*i.e.* consisting primarily of leases). As previously discussed, while motions to amend judgments serve a variety of purposes, rehearing the merits of a case is not one of them. Rather, among other things, motions to amend are to correct manifest mistakes of law or fact – neither of which defendants have shown with respect to the receivables issue. Consequently, the court denies defendants' motion to alter or amend the judgment insofar as it is premised upon the fact that the court did not award defendants damages for the claimed loss of equity in AMC's receivables.

To summarize with respect to defendants' motion brought pursuant to Fed. R. Civ. P. 52 and 59, the court denies this motion in its entirety. Denial is proper because defendants have not met the high threshold which is necessary to warrant altering or amended the judgment under either of those Rules. Defendants have pointed to no "highly unusual circumstances" which might justify reopening the judgment herein. See Kona, 229 F.3d at 890. Nor have they come forth with "substantial reasons[,]" Cohn, 2006 WL 825276, at *1, which could be the basis for granting this "extraordinary remedy[.]" See Kona, 229 F.3d at 890.

. . .

II. Exoneration of Bonds & Vacation of Provisional Attachment Order

Having denied the parties' post-judgment motions with one corrective exception, there is one final motion which the court must address – FINOVA's motion for exoneration and return of the bonds which it posted in connection with being awarded injunctive relief, and for vacatur of the order granting defendants a writ of prejudgment attachment. Doc. 268.

Early on in this litigation the court issued three orders granting injunctive relief to FINOVA. Each of those orders was expressly "conditioned" upon FINOVA filing a bond with the Clerk of the court in accordance with Fed. R. Civ. P. 65©. On July 19, 2002, FINOVA filed the first of those bonds; this one in the amount of $25,000.00 See Doc. 5. A few months later, this time in connection with a Supplemental Temporary Restraining Order against defendants, FINOVA filed a second $25,000.00 bond. See Doc. 25. A short time later, the court granted FINOVA's motion for a preliminary injunction; this time the court required FINOVA to file, which it did, a $100,000.00 bond. See Doc. 41.

Several years later, on September 21, 2005, the court denied defendants' application for a Temporary Restraining Order. Doc. 210. However, the court did grant defendants' alternative application for a prejudgment writ of attachment pursuant to A.R.S. § 12-1521. Id. at 12. As section 12-1524 requires, the court set bond at "$4.5 million." Id. at 13.

On September 18, 2006, "in anticipation of judgment being entered in the form jointly lodged on September 15, 2006[,]" FINOVA filed a motion for release and exoneration with respect to the

three injunction related bonds described above. Doc. 268 at 1. As part of this motion FINOVA is seeking to have the Clerk of the Court release the original of those bonds "to a representative of legal counsel for FINOVA[.]" Id. at 2, ¶ (2). FINOVA is also seeking to have the court vacate its September 21, 2005, order granting a writ of prejudgment attachment (doc. 210).

FINOVA's position is that entry of judgment renders the bonds "moot." Doc. 268 at 3. Therefore, because two days after the filing of this motion to vacate, etc., on September 20, 2006, the judgment was filed in this action, FINOVA believes that the bonds are moot. As to the writ of prejudgment attachment, FINOVA asserts that the court should vacate the order granting that relief because the judgment "after all applicable set-offs[] results in FINOVA being awarded a net monetary judgment against Defendants." Id. Thus, FINOVA reasons, "there is no remaining claim on the part of Defendants to support an attachment against FINOVA's assets." Id.

Defendants did not respond directly to any of these arguments. In fact, they did not respond at all with respect to the request to vacate the writ of prejudgment attachment. As to the three bonds corresponding to FINOVA's injunctive relief, defendants request that the court deny such relief "and retain the bonds *until such time* as [it] rules on Defendants' Rule 52 and 59 post-trial motions." Doc. 277 at 2 (emphasis added).

Because the court has now ruled on defendants' post-trial motions, there is no basis for denying FINOVA's motion to "releas[e] and exonerat[e] FINOVA and its sureties from any and all further liability under the FINOVA Bonds" (doc. 7, 25, and 41). Accordingly, the court hereby grants FINOVA's motion in this

regard(doc. 268). In addition, because defendants do not object to vacating the writ of prejudgment attachment; and because there is no basis for denying such relief at this time, the court also grants FINOVA's motion to vacate the September 23, 2005 (doc. 215) Order "to the extent that such Order granted Defendants' application for prejudgment attachment against FINOVA." See Doc. 268 at 3, ¶ C(3).

IT IS HEREBY ORDERED that:

(1) plaintiff FINOVA Capital Corporation's "Motion to Alter or Amend Judgment and to Amend Findings and Conclusions" (doc. 278) is GRANTED in part, to the extent FINOVA is seeking a reduction from $479,213.08 to $363,177.94 as the principal amount awarded against it in paragraph 2 of the Judgment (doc. 269);

(2) FINOVA's motion (doc. 278) is DENIED in all other respects;

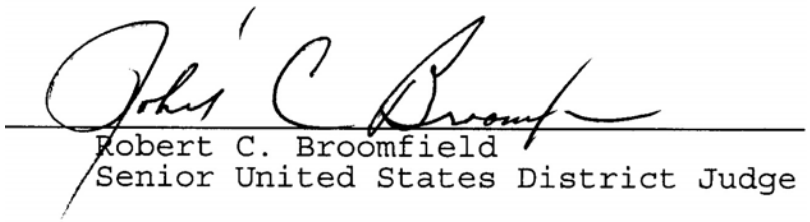
(3) "Defendants' Motions for New Trial, to Amend Findings of Fact and Conclusions of Law and to Amend Judgment" (doc. 280) are DENIED;

(4) "Plaintiff's Motion for Order (A) Exonerating Parties Under bonds and (B) Vacating Provisional Attachment Order" (doc. 268) is GRANTED;

(5) The Clerk of the Court shall enter an Amended Judgment consistent with this Order, which shall include an amendment of paragraph 2 of the original judgment indicating that “AMC Shall have and recover from FINOVA the principal amount of $363,177.94,” rather than the amount previously indicated of $479,213.08; all calculations in the Amended Judgment shall conform to this $363,177.94 award; and

(6) The Clerk of the Court shall release to a representative of legal counsel for FINOVA the originals of each of the FINOVA bonds (docs. 7, 25, and 41).

DATED this 29th day of June, 2007.



Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record